the said last will and testament was duly executed, and that the same is genuine and valid, and that the said John Tonnele, deceased, at the time of executing the said last will and testament, was in all respects competent to devise real estate and not under restraint, and this court doth further order and decree, that the said last will and testament, and the proofs and examinations taken in respect to the same be recorded, and that the said last will and testament be admitted to probate, and that the same be, and hereby is established as a will of real and personal estate. And it is further ordered and decreed, that the contestants John Tonnele, junior, and Rebecca Tonnele, pay the costs of the executor, Valentine G. Hall, which have accrued in this matter from the contesting the proof and validity of the said will to be taxed.

In the Superior Court.

Before the Honorable T. J. OAKLEY, Assistant Justice of the Superior Court.

IN THE MATTER OF WILLIAM GREGG AN INFANT.—*1st June*, 1847.

HABEAS CORPUS—CUSTODY OF INFANT.

The general doctrine that a father has an absolute right to the custody of his child, if personally unobjectionable, cannot be sustained in this state.

Where an infant possesses sufficient discretion to make a choice for itself as to the disposition of its person, all the court will do under a writ of habeas corpus, is, to see that all restraint is removed, and that such choice may be made freely.

The rights of the child are alone to be considered, in such a case, and those rights are to be protected in the enjoyment of its personal liberty, according to its own choice, if arrived at the years of discretion, and, if not, to have its personal safety and interests guarded and secured, through the agency of those who are called upon to administer to it.

Where a child of tender years, and of feeble and delicate health, and where, therefore, the necessity of maternal care is evident, is found to be in the custody of the mother, the law will not interfere to remove it from such custody.

But where a child has arrived at the age when the superior judgment of the father may be important in laying the foundation of its future education and mental training in reference to its future establishment in life, the court will permit the father to have such custody, inasmuch as the superintendence and judgment of the father will better subserve the true interests of the infants than those of the mother

The circumstances of this case sufficiently appear in the opinion of the learned judge.

The case occupied the attention of his honor for several days, and was argued with great ability.

David Paul Brown and *Livingston Livingston*, for Dr. Gregg, the relator.

Isaac Dayton and *J. W. Gerard*, for Mrs. Gregg, the respondent.

OAKLEY, J.—The writ of habeas corpus in this case was sued out by Doctor William Gregg, of the city of Philadelphia, to bring up the body of his infant son, detained illegally, as was alleged, in the custody of his wife, in the city of New-York.

By the return to the writ, it appears that Doctor Gregg and Mary E. Westervelt were married on the 26th day of June, 1838. The Doctor settled in Philadelphia, as a physician, and there, on the 25th day of May, 1841, the only child of the marriage, a son, was born. Immediately after its birth, as Mrs. Gregg alleges, the treatment of her husband became not only unkind but cruel, and indeed inhuman, and finally, in the month of March, 1842, believing, as she says, that she could not continue to live with him without endangering her personal safety, she left his house, taking the child, then about ten months old, with her, and came to New-York, where she has since resided, under the protection of her brother and other members of her family.

Doctor Gregg, in his answer to this return, denies very fully all these allegations of cruel and harsh treatment, and it is one of the most painful circumstances of this case, that the husband and wife are opposed to each other in their respective statements, under oath, in a degree that renders it very difficult to resist the conviction that on the one side or the other, there has been a wilful departure from the truth.

The parties being thus at issue, have gone very extensively into evidence, both oral and documentary, to sustain their respective allegations. I listened very attentively to the proofs when they were read, and to the very minute and able discussion of them by the counsel. Without going into any detailed examination of them here, their general result and effect, as I estimate them, may be briefly stated. It appears that family difficulties arose between the parties, the precise nature and origin of which cannot be with any certainty determined from any legal or competent evidence. These difficulties seem to have been at one time removed and harmony restored by the intervention of a mutual friend. This reconciliation took place after the occurrence, according to the statement of Mrs. Gregg, of many of these acts of harsh and cruel treatment on the part of her husband, which she now assigns as reasons for leaving her husband's house. A renewal of this harsh and cruel treatment after the reconciliation, and in a greater degree, is averred by Mrs. Gregg, as the immediate cause of her return to her friends in New-York.

It appears to me that there is nothing in the evidence to support these allegations; and upon the whole case I must say, that the attempt of Mrs. Gregg to establish by proof any justifiable or reasonable ground of separation from her husband has failed.

I am very well aware that in the privacy of domestic retirement there may be a course of conduct on the part of the husband which may render the life of the wife miserable, and even intolerable, without the power on her part of establishing it by evidence, or on his of showing any circumstances in excuse or extenuation. But in a proceeding of this kind, I can look only to the proof before me, and it is the less important to examine more particularly the evidence on this head, as it is quite clear that whatever may be thought to be its general aspect, there is no fact established which can justly be considered as affecting unfavorably the character of Doctor Gregg, or his general fitness for the care and custody of his child. It is in this view alone that upon a proceeding under the writ of habeas corpus the judge can consider the circumstances which may have attended the separation of the parents. So long as those circumstances do not prove either parent personally disqualified for the safe custody of the child, they are immaterial.

It appears also in evidence that both father and mother are persons of good moral character, and both of sufficient pecuniary means to enable them properly to take charge of the child, and that the child, though never having been subject to any complaints other than those which are ordinarily incident to childhood, is of delicate health, and in the judgment of the only physician who has been examined in relation to it, still requires the care of the mother.

In this state of the case, the question is presented, whether I am bound by the established rules of law to order that the custody of the child shall be surrended by the mother.

On the hearing, it was contended by the counsel for the relator, that in the absence of any personal disqualification of the father for the safe custody of the child, the law establishes his positive right to it, to the exclusion of the mother, without regard to any other circumstance. On the part of the respondent, it was insisted that the rule of law in this state is, that it is not only the right, but the duty of the judge to consider only the interests of the child, and to exercise a sound discretion, under the circumstances of the case, in determining the question as to the custody in which it should be placed. Numerous authorities bearing upon the question, were cited from the English books, and from the decisions of the courts of this state, and of other states of the Union. I have had occasion heretofore to examine most of these authorities, and I have again looked into them, after hearing the comments of the counsel, and especially into the more recent cases decided by the higher courts of New York. It is from these that I must derive the rules that are to govern in disposing of the question now before me. I shall not here enter into any detailed examination of these cases, as it would be only a repetition of what has been several times done by others, but shall content myself with

extracting from them the principles which they appear to establish.

The general doctrine, that the father has an absolute right to the custody of his child, if personally unobjectionable, does not seem to be sustained by the law of this state as expounded by its highest tribunals. It is a matter of frequent occurrence that this supposed absolute right is made to yield to the mere will of the child. In cases where the child is of sufficient discretion, though still an infant in the eye of the law, to make a choice for itself as to the disposition of its own person, all the court does under the writ of habeas corpus, is to see that all restraint is removed, and that such choice may be freely made; and this choice may be not only in favor of either parent against the other, but is not unfrequently opposed to the wishes and claims of both, the child preferring to place itself in the care and custody of strangers.

The question then as to the alleged superior right of the father, can only arise when the child cannot, as in the present case, choose for itself, and here the real point at issue between the parties presents itself, the relator contending that in such a case the law determines that the safest place for the child is under the care and custody of the father, and the respondent insisting that the question is left at large, to be determined by the court exercising a sound discretion, and acting solely in reference to the interests of the child under the circumstances of the case. Both positions assume that the real interest of the child is the principle which must govern, but they differ as to the mode by which that interest is to be ascertained and determined.

It would seem, then, that the real question in these cases is not what are the rights of the father or mother to the custody of the child, or whether the right of the one be superior to that of the other, but what are the rights of the child; and I cannot but think that much of the apparent conflict in the various decisions of the courts in these cases, and in the reasoning which has been resorted to, to sustain them, has arisen from loose and undefined notions as to the nature of the questions involved. They have not unfrequently been treated as if they were cases involving the rights of property rather than mere personal rights, and as if the parents were setting up conflicting claims to a property in the child. The true view is that the rights of the child are alone to be considered, and those rights clearly are to be protected in the enjoyment of its personal liberty, according to its own choice, if arrived at the age of discretion, and if not, to have its personal safety and interests guarded and secured by the law acting through the agency of those who are called upon to administer it.

On a careful consideration of all the cases on this subject in our own courts, and particularly of the case of *Barry* v. *Mercein*, which was repeatedly under discussion in the highest tribunals of the state, I am satisfied that the position contended for by the respondent's counsel on the present occasion is correct, and that, according to the spirit of all the decisions, the question at issue between these parties must be determined by the exercise of a sound discretion, having reference solely to the present interests of the child. In all the cases, even those in which the superior right of the father seems to have been most strongly maintained, the principle is clearly recognized that there may be circumstances irrespective of any personal disqualification of the father which may defeat his claim.

The discretion which is thus to guide in the decision of cases like the present is not an unregulated or arbitrary discretion of the judge, for that has been justly said to be "the law of tyrants," but a discretion governed, as far as the nature of the case will admit, by fixed rules and principles. It is certainly somewhat difficult to define these rules and principles with precision, but keeping in mind that the present interests of the child are alone to be consulted, I think they may be safely sought for in considerations connected with its age and health.

Where a child is found in the custody of its mother, of tender years, or of feeble and delicate health, and where the necessity of maternal care is evident, the law will not interfere to remove it from such custody, and could not do it without shocking the common sense and feelings

of mankind. But where the child has arrived at an age at which it becomes important to determine upon its course of education and mental training in reference to its future business and establishment in life, it may reasonably be supposed that the superintendence and judgment of the father will better subserve its true interests than those of the mother. While the physical safety of the child, and the incipient stages of its education are the chief objects to be regarded, it is quite clear from observation and experience that these may be safely intrusted to the mother, and that in general, under such circumstances, maternal is more safe and effectual than paternal care and superintendence.

In applying these principles to the case now before me, and considering the tender age of the child, its somewhat delicate health, and its tendency to certain diseases, which in the judgment of the physician, who is most capable of expressing an opinion from the opportunities which he has enjoyed of forming one—it seems to me that a regard to its real welfare forbids my interfering with its present situation. I find the child safe where it is in the custody of its mother, requiring her care and watchfulness, and not in my opinion, having yet arrived at an age when the superior judgment of the father would be important in laying the foundation of its future education and intellectual culture.

With these views of the spirit of the law, as fairly inferred from all the cases on the subject which have been decided in this state, and in the exercise of that judicial discretion, by which I must be guided, I can only say, as did the Chancellor in the case of *Barry* v. *Mercein*, that in my judgment no good reason now exists for removing the child from the custody of the mother.

In coming to this result, I cannot but express the hope that means may yet be found of reconciling the parents of this child, and that, in a spirit of mutual concession, and under a sense of their obligations and duties to each other and to the good order of the society in which they live, and, above all, from a regard to the welfare of their child, they will terminate this painful controversy, and give no occasion for any future interference of the law in their domestic concerns.

SALVAGE.

RULE OF COURT AS TO COSTS WHERE TENDER IS MADE AND REFUSED.

The following opinion of Dr. Lushington in a case of salvage, where a tender was made and refused, is worthy a perusal:

Dr. Lushington.—The ordinary rule of the Court is that, when a tender is made and rejected, and then pronounced for, the sentence shall be followed with a condemnation in costs. However, there has been a great change within the last few years in the practice of other courts, on the subject of costs. I allude more particularly to the opinions of Lord Cottenham and the Master of the Rolls, who have said that costs are given, not with a view of punishment, but as a matter of justice to the other party; and I have considered how far these cases can be applied to salvage. I confess I have great difficulty in applying them with rigidity, and for this reason, that there is in salvage something so loose, indefinite, and incapable of being determined by the best constituted minds, when looking only at their own case, that I am not inclined to press the doctrine to its full extent. Where there has been an offer so considerable, that upon the face of the proceedings, it ought to have been accepted, I must administer justice in the manner I have referred to, while however, in the present case, I think the tender ought to have been accepted, yet looking at the value of the property, and other circumstances, I am unwilling to deprive the parties of their reward, and I do not think it would be an advantage to the public that I should do so, because there is an ingredient in these cases beyond justice between man and man, the inducement to employ every effort for the preservation of property and the advancement of the several interests of the maritime community. The parties must, therefore, each pay their own costs. *The Williams*, (*reported in Penn. Law Journal*, *vol.* 6, *p.* 390.)